

# California Fair Political Practices Commission

July 19, 1989

Richard Damm  
1414 K Street, Suite 216  
Sacramento, CA 95814

Re: Your Request for Informal Assistance  
Our File No. I-89-350

Dear Mr. Damm:

You have requested advice concerning your responsibilities under the Political Reform Act (the "Act").<sup>1</sup> Because your request for advice does not concern a specific decision pending before the commission, we treat your request as one for informal assistance pursuant to Section 18329(c) (copy enclosed).<sup>2</sup>

## QUESTION

You are currently employed as a consultant to the Senate Commission on Corporate Governance, Shareholder Rights and Securities Transactions (hereafter "Senate Commission"). Would your employment as a consultant with the Chicago Board of Options Exchange and the Chicago Mercantile Exchange, while on vacation or leave of absence from the Senate Commission, create a conflict of interest?

## CONCLUSION

The Political Reform Act does not prohibit you from accepting employment as a consultant with the Chicago Board of Options

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<sup>1</sup> Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Code of Regulations Section 18000, et seq. All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

<sup>2</sup> Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Government Code Section 83114; 2 Cal. Code of Regs. Section 18329(c) (3).)

Exchange and the Chicago Mercantile Exchange. However, you may not, as a consultant for the Senate Commission, participate in a decision if it has a reasonably foreseeable material financial effect on a source of income to you in the 12 months prior to the decision, which is distinguishable from the effect on the public generally.

#### ANALYSIS

Section 87100 prohibits a public official from making, participating in, or attempting to influence a governmental decision in which he knows or has reason to know he has a financial interest. The term "public official" includes consultants to the Legislature. (Sections 82048, 82049.)

A public official has a financial interest in a decision if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official or a member of his or her immediate family or on, among other things:

(c) Any source of income, other than gifts and other than loans by a commercial lending institution in the regular course of business on terms available to the public without regard to official status, aggregating two hundred fifty dollars (\$250) or more in value provided to, received by or promised to the public official within 12 months prior to the time when the decision is made.

(d) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.

#### Section 87103(c)-(d).

When an official receives income from, or is employed by, a business entity it is necessary to consider how governmental decisions would affect the business entity. An official may be disqualified from participating in a decision even though the decision would not affect the amount of income he or she receives.

As a consultant, you expect to receive income from the Chicago Board of Options Exchange and the Chicago Mercantile Exchange (hereafter "Exchange"). In addition, as a consultant, you may be deemed an employee depending on the circumstances of your arrangement with the Exchange.

While still employed as a consultant with the Senate Commission, if you have been promised income of \$250 or more, even if it has not been received by you to date, you may not make, participate in, or attempt to use your position to influence any governmental decision which will have a reasonably foreseeable

material financial effect, distinguishable from the effect on the public generally, on your source of income. (Section 87103(c).) Subsequent to your accepting a position with the Exchange, you may not make, participate in, or attempt to use your position to influence any governmental decision which will have a reasonably foreseeable material financial effect, distinguishable from the effect on the public generally, on a source of income to you in the 12 months prior to the decision or on any business entity by which you are employed. (Section 87103(c)-(d).)

#### Foreseeability

The effects of a decision are reasonably foreseeable if there is a substantial likelihood that they will occur. To be foreseeable, the effects of a decision must be more than a mere possibility; however certainty is not required. (Downey Cares v. Downey Development Com. (1987) 196 Cal. App. 3d 983, 989-991; Witt v. Morrow (1977) 70 Cal. App. 3d 817, 822; In re Thorner (1975) 1 FPPC Ops. 198 (copy enclosed).) The Act seeks to prevent more than actual conflicts of interest, it seeks to prevent even the appearance of a possible conflict of interest. (Witt v. Morrow, supra at 823.)

#### Materiality

Regulations 18702-18702.6 (copies enclosed) set forth the guidelines for determining whether an official's financial interest in a decision is "material" as required by Section 87103. If the official's financial interest is directly involved in the decision, then Regulation 18702.1 applies to determine materiality.<sup>3</sup>

If the official's financial interest is indirectly involved in the decision, Regulations 18702.2 through 18702.6 provide guidelines for determining whether the effect of the decision is material. In particular, Regulation 18702.2 provides the financial guidelines to determine whether the effect of the

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<sup>3</sup> A person or business entity is directly involved in a decision before an official's agency when that person or entity, either personally or by an agent:

(1) Initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request or;

(2) Is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official's agency.

(3) A person or business entity is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the subject person or business entity.

decision is material as to the business entity which is a source of income to the public official or in which the official is employed.

Public Generally

Even if the reasonably foreseeable effect of a decision is material, disqualification is required only if the effect of the decision on the public official's financial interest is distinguishable from the effect on the public generally. (Section 87103.) The effect is deemed distinguishable unless the decision will affect the business entity in substantially the same manner as it will affect all members of the public in the state, or a significant segment of the public. (Regulation 18703, copy enclosed.)

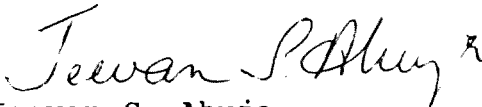
Accordingly, you may work in the capacity of a consultant for the Exchange, while on vacation or leave of absence from the Legislature. However, you must determine on a case-by-case basis whether you must disqualify yourself from certain governmental decisions which might affect a business entity which employs you or an organization which is a source of income to you.

Please note that although the Act does not prevent you from working as a consultant for the Exchange, there may be Senate policies which prohibit such employment. We suggest you consult the Senate Rules Committee on this matter.

I trust this letter has provided you with the guidance you requested. If you have further questions regarding this matter, please contact me at (916) 322-5901.

Sincerely,

Kathryn E. Donovan  
General Counsel

  
By: Jeevan S. Ahuja  
Counsel, Legal Division

KED/JSA/aa

Enclosures

# California Legislature

JUN 7 1989

RECEIVED



Senate Commission  
on  
Corporate Governance, Shareholder Rights  
and Securities Transactions

SENATOR DAN MCCORQUODALE  
CHAIR

June 6, 1989

Legal Division  
Fair Political Practices Commission  
428 J Street, Suite 900  
P. O. Box 807  
Sacramento, California 95814

Dear Ms. Belisle:

I would like an opinion regarding the legality--and perhaps propriety--of my working in the capacity of a consultant for the Chicago Board of Options Exchange and the Chicago Mercantile Exchange in an off-legislative payroll/leave of absence or vacation arrangement.

The following are the particulars of my present position and the consulting arrangement which has been proposed:

(1) The Senate Governance Commission is an advisory body which was formed in 1986 to "evaluate laws relating to, and practices of, corporate management, investment managers and investors, with particular concern to reconciling the need to establish stability for corporations operating in or desiring to locate in California with the fiduciary obligations of investment managers and pension fund trustees to prudently invest shareholder funds. The Commission shall be limited in the scope of its study only to the extent that the study shall not exceed a reasonable inquiry into the protections of California shareholders, as deemed by the Commission chair."

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1414 K STREET, SUITE 216  
SACRAMENTO, CA 95814  
(916) 324-7173  
ATSS 8-454 71/3

OFFICE ADDRESS:  
STATE CAPITOL  
ROOM 4032  
SACRAMENTO, CA 95814  
(916) 445-3104

CONSULTANTS:  
RICHARD DAMM  
PETER SZEGO

SECRETARY:  
JEANICE TIPPS

(2) The Commission membership is composed of Senators, law professors, State Bar representatives, members of the securities industry, persons with a background in business finance, the Corporations Commissioner, State Constitutional officers, members of the retirement systems and members of major trading exchanges.

(3) The Commission's primary activities have been to recommend legislation and general policy on corporate voting rules, mergers, acquisitions and leveraged buyouts, directors' and officers' liability, arbitration and penalties for securities code violations.

(4) The Commission does not vote, but it does, through individual members, make recommendations to Senators on policy issues.

(5) As staff consultant, I advise Commission members of issues raised by other members, schedule meetings, advise members of legislation and hearing dates and provide background materials for meetings and hearings.

(6) My background is in economics and finance, with a degree in economics from Harvard and previous work experience with the Harvard Business School.

(7) The Chicago Board of Options Exchange and the Chicago Mercantile Exchange are both regulated by the Commodities Futures Trading Commission (CFTC) under federal legislation which specifically preempts any state legislation which might be proposed for the regulation of options, futures or other hedging contracts. There is a minor controversy surrounding regulatory authority over a financial product known as "bundled options", which the Securities and Exchange Commission argues is a security. The SEC would like to have this limited jurisdiction, and the state arguably could possibly gain some regulatory authority if these options were deemed securities. The CBOE and the MERC may also have indirect contact with regulated entities such as the regional stock exchanges, depending on the outcome of SEC action and litigation over the issue of multiple listing. This is also an unresolved issue.

(8) The proposal from the CBOE and MERC is for me to participate in a marketing program for institutional investors (bank trusts, insurers, etc.) in which I would identify those groups that are not participating in options, futures and

hedging strategies and specify which employees should be invited to educational seminars sponsored by the foundations funded by the CBOE and the MERC. I would also provide introductions to marketing executives in situations where I have a personal relationship with a money manager.

(9) All services would be performed on leave of absence or vacation from the Senate.

I would appreciate your opinion and advice as soon as possible, since I will not enter into an agreement until I receive your response. Please call me if you need any further information.

Sincerely,

A handwritten signature in dark ink, appearing to read "Richard Damm", with a stylized, cursive script.

Richard Damm

RD:jt



# California Fair Political Practices Commission

June 8, 1989

Richard Damm  
Office of Senator McCorquodale  
1414 K Street, Suite 216  
Sacramento, CA 95814

Re: Letter No. 89-350

Dear Mr. Damm:

Your letter requesting advice under the Political Reform Act was received on June 7, 1989 by the Fair Political Practices Commission. If you have any questions about your advice request, you may contact Jeevan Ahuja an attorney in the Legal Division, directly at (916) 322-5901.

We try to answer all advice requests promptly. Therefore, unless your request poses particularly complex legal questions, or more information is needed, you should expect a response within 21 working days if your request seeks formal written advice. If more information is needed, the person assigned to prepare a response to your request will contact you shortly to advise you as to information needed. If your request is for informal assistance, we will answer it as quickly as we can. (See Commission Regulation 18329 (2 Cal. Code of Regs. Sec. 18329).)

You also should be aware that your letter and our response are public records which may be disclosed to the public upon receipt of a proper request for disclosure.

Very truly yours,

*Scott Hallabum for*  
Kathryn E. Donovan  
General Counsel

KED:plh